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978-0-521-19413-6 - The United Nations Secretariat and the Use of Force in a Unipolar World

Ralph Zacklin

Excerpt

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Introduction

In an interview with the BBC World Service on 16 September 2004, Secretary-General Kofi Annan said that the United States-led invasion of Iraq in 2003 had been an illegal act that contravened the United Nations Charter.¹ The remarks which were teased out of him by a persistent interviewer provided an unexpected coda to a long-running saga, the origins of which could be traced back more than a decade.

The furore caused by these remarks in the United States was not due to the use of the word 'illegal' but to their timing. The characterization of the invasion of Iraq as illegal was hardly news. It is true that hitherto, the Secretary-General had done his utmost to avoid using so direct a condemnation of the war, but he had made it clear on numerous occasions that absent a specific authorization of the Security Council the use of force in the 2003 invasion of Iraq would not be and was not in conformity with Charter. The timing of the remarks, however, a few short weeks before a closely contested presidential election, had been seen by some in the Bush administration and by many in the neo-conservative community as a deliberate attempt to influence the outcome of the election.²

¹ Extensive segments of the interview were published on the BBC news on-line on 16 September 2004. The BBC's correspondent at the United Nations headquarters in New York pointed out that the Secretary-General had made similar comments before but in a more diplomatic way.

² Randy Scheunemann, a former advisor to the US Defence Secretary, Donald Rumsfeld, told the BBC 'I think it is outrageous for the Secretary-General, who ultimately works for the member states, to try and supplant his judgement for the judgement of the member states... To do this 51 days before an American election reeks of political interference'. See BBC news on-line, 16 September 2004. Mr Scheunemann's neo-conservative credentials are impeccable. In addition to Secretary Rumsfeld, he had been a foreign policy adviser to Senators Trent Lott and Bob Dole. In 2002 he was a founder

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It is doubtful, to say the least, that any Secretary-General would be rash enough to attempt to influence the outcome of an election in any Member State, least of all in the United States, but the BBC interview and the uses to which it was put by the media and the chattering classes, especially in the United States, demonstrated the vulnerability of high-level international officials to pressure from both inside and outside government.

The interview had long-term and very damaging consequences for the United Nations as an institution and for the Secretary-General both in his capacity as the chief administrative officer of the Organization and personally. It contributed to the unleashing of a campaign against the Secretary-General and the Secretariat, the likes of which had not been seen since the days of McCarthy, and through a witch-hunt, otherwise known as the Volcker Inquiry, came within a paragraph of forcing the resignation of the Secretary-General. Kofi Annan in fact became the second Secretary-General within less than a decade to fall victim to American presidential politics, Boutros Boutros-Ghali having been forced out of office by an American veto during the 1996 presidential campaign.

What had attracted such visceral distaste of the Secretaries-General by the world's only super-power? Both Boutros-Ghali and Annan had been appointed like all Secretaries-General with the support of the United States and had enjoyed for a time excellent relations with Washington. But both had had the misfortune, or the challenge, of occupying the office of Secretary-General in the post-Cold War period when the use of force with or without Security Council authorization had become more prevalent in a variety of situations. Both had exhibited a tendency towards independence of thought which Washington found difficult to accept in what one commentator has described as an era of 'foreign policy evangelicalism'.³ The importance of multilateralism, of the principles enshrined in the United Nations Charter and a preference for peaceful settlement of disputes over use of force except in the very last resort, all created a fertile ground for differences between the dominant member state and the Secretaries-General appointed to head the Secretariat.

Reference is made here to the Secretariat of the United Nations rather than to the Secretary-General. The term Secretariat is used here in the

of the Committee for the Liberation of Iraq and an enthusiastic supporter of Ahmad Chalabi, the Iraqi exile who was a Pentagon favourite in the run-up to the 'liberation' of Iraq. In 2008 he was a foreign policy adviser to Senator John McCain in his unsuccessful bid for the Presidency of the United States.

³ R. Skidelsky, 'The American Contract', *Prospect*, 1 July 2003.

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sense of Articles 7 and 97 of the Charter, i.e., the Secretariat as a principal organ of the United Nations comprising a Secretary-General and such staff as the Organization may require. There is a threefold significance in this for the purpose of examining the role of the Secretariat in regard to the use of force.

Firstly, the Secretariat's capacity to act autonomously stems from the organic nature of the Organization. The very ambiguity of the role of the Secretariat as outlined in Chapter XV of the Charter lends itself to such a view. More precisely there are a number of elements contained in Chapter XV that underscore such a role: the absence of clear indications as to the limits of the Secretariat's role; the broad implied powers of the Secretary-General under Article 99; and the exclusively international character of the responsibilities of the Secretary-General and of the staff. Historically, the powers of the Secretary-General and the concept of the international civil service have been the pillars on which the Secretariat's role has been constructed.

Secondly, while it is true that the Office of Legal Affairs has existed in one form or another from the inception of the Organization, and it is through that Office that formal legal advice is provided throughout the Organization, the Office of Legal Affairs is by no means the only Secretariat department which contributes to the formation of legal statements and pronouncements by the Secretary-General. This is especially true of the period covered in this book and when major policy speeches of the Secretary-General were being crafted.

Thirdly, if the Secretariat is to play a role in the public legal discourse it must have a voice and that voice can only be the Secretary-General.⁴ While all Secretaries-General develop their own conception of the office, and the degree to which the law may play a role in their individual conception may vary, historically all of them have identified with and understood the importance of the Charter principles and the role of international law in the exercise of their functions. This is particularly true of the three Secretaries-General who held office in the post-Cold War period. As Stephen Schwebel has noted, when the powers established by Article 99 are taken together with the 'strategic world position' of the Secretary-General as the person who 'more than anyone else will stand for the United Nations as a whole',

⁴ For an insightful analysis of the role of the Secretary-General in promoting international law through respect for Charter-based principles, see I. Johnstone, 'The Role of the UN Secretary-General: the Power of Persuasion based on Law', *Global Governance*, 9 (2003), 441–58.

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it can be said that Article 99 together with Article 98 provides a legal base for the 'political personality' of the Secretary-General.⁵

The role of international law and of the international lawyer in the Secretariat of the United Nations is a complex one. It is after all a political organization. Needless to say the profile of that role has undergone considerable change over the years as the practice of the Organization has evolved but also as a reflection of the personalities, predilections and knowledge of individual Secretaries-General. In 1948, the *British Year Book of International Law* published an article entitled 'The Development of International Law through the Legal Opinions of the United Nations Secretariat'.⁶ The author was Oscar Schachter who at the time held the position of Senior Legal Counselor in the United Nations Legal Department.

Schachter had very clear, one might say audacious, views as to the place of law in the United Nations and the role of the Secretariat. Notwithstanding the political character of the United Nations Charter, the actions of Member States and of the organs of the United Nations were not, in his view, simple 'acts of policy', free of legal restraints. For whatever reason, members of the United Nations found it necessary to 'maintain that their acts are in conformity with legal principles and procedures'.⁷ In the context of a rules- and law-based Organization, as he saw it, the Secretariat of the United Nations had a particular role to play because apart from the International Court of Justice, the Secretariat is the only principal organ which is not composed of Member States. Its members, like the Court, serve in an individual capacity and they are required by the Charter not to seek or receive instructions from any government or any external authority. In other words, as international civil servants they had a duty to give impartial legal advice independent of the interests of individual governments.

This role was quite different from that of the International Court of Justice because, as Schachter put it, 'in practice there is a need for impartial legal advice which can be given at the time a question is under consideration and which does not have the formality of a judicial pronouncement'. There was no formal authority for this general legal advisory function but the Secretariat at that very early stage in the history of the Organization had adopted a role which filled a practical need to provide day-to-day legal advice to the organs of the Organization.

⁵ S. M. Schwebel, *The Secretary-General of the United Nations: his Political Powers and Practice*, Cambridge, Massachusetts: Harvard University Press, (1952), 299.

⁶ O. Schachter 'The Development of International Law through the Legal Opinions of the United Nations Secretariat', *British Yearbook of International Law*, 91 (1948), 105.

⁷ *Ibid.*, 92.

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The proposition that the United Nations Secretariat could or should perform such a general legal advisory function would today be regarded by many as a fantasy. Indeed the confident assertion in the 1948 *British Yearbook* article that the competence of the Secretariat to furnish legal advice, even in connection with controversial political issues before the Security Council, had been confirmed by the practice of that organ as early as 1946, today reads more like a historical artifact than a recognizable description of the role of the Secretariat. As Michael Wood observed in his 2006 Lauterpacht Lectures, the Security Council is not given to legal introspection and when it does seek legal advice it relies almost exclusively on the legal advisers of the missions and not the Secretariat.⁸

If that is the case and the legal advice of the Secretariat is not generally sought by the Security Council, or for that matter the General Assembly, on controversial political issues, why do the views of the Secretariat on the use of force matter? There are many reasons why these views matter and not only in a theoretical sense but in a very real political and operational sense. Firstly, as we have already pointed out, the Secretariat through the Secretary-General's political personality has an important voice in the public discourse concerning the legal aspects of the use of force. This was abundantly clear during the prelude to and in the aftermath of the Iraq War when the media was virtually saturated with opinions on the question of the legality of the war. It is a truism, as Schachter among others pointed out, that Member States as a general rule like to maintain that their acts are in conformity with the Charter and international law and in that sense the views of the Secretary-General are extremely important in the market place of public opinion. Secondly, even if the Secretariat's views are not solicited directly by the Security Council on matters involving the use of force, the fact that the Secretariat has a particular view on a given question becomes known to Member States in a variety of ways and may very well influence their approach to that particular issue. Thirdly, the international organization lawyer, as the late Sir Arthur Watts observed, occupies a unique position within the Secretariat of an organization like the United Nations in the space that he described as lying between the politically desirable and the legally defensible. It is from this vantage point that the lawyers are frequently called upon to provide legal advice to the Secretary-General and to the Secretariat departments. The legal advice to departments such as the Departments of Political Affairs and Peacekeeping

⁸ M. Wood, 'The UN Security Council and International Law', *Lecture Series*, (Lauterpacht Centre for International Law, 2006).

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has significant political and operational consequences while the advice given to the Secretary-General shapes his actions and informs his public pronouncements.

In this book I propose to examine the role and the views of the Secretariat regarding the use of force during a period of time that became known as the unipolar world. Specifically, the period in question is bracketed by the Iraq–Kuwait conflict of 1991 and the Iraq War in 2003, but it also included Somalia, Rwanda, Bosnia and Kosovo. I will examine the Secretariat’s position regarding the use of force in four of these conflicts, the Iraq–Kuwait conflict, Bosnia, Kosovo and the Iraq War, each of which presented the Secretariat with very different challenges and sets of issues. The first of these presented itself as the dawn of a new world order, but soon came to be seen by the Secretariat as an incipient breakdown of the old order represented by the Charter in the face of a new kind of imperialism. The Bosnia conflict, which grew out of the breakup of the Yugoslav Republic in the early 1990s, placed wholly unrealistic expectations on United Nations peacekeeping and resulted in confusion and a disconnect between political decision-making by the Security Council and the realities on the ground. The relationship between the Security Council and the Secretariat in these years was fractured and polemical. The Kosovo conflict, coming so soon after the terrible events of Srebrenica, challenged the legal and moral authority of the Charter while at the same time offering the Secretary-General an opportunity to exercise his leadership at a time when the institutional political organs of the United Nations were divided. Finally, the Iraq War presented the Secretariat with the challenge of a use of force which it perceived as lacking in legitimacy and which to all intents and purposes was illegal since it was in breach of fundamental Charter principles.

In tracing and examining the role of the Secretariat with regard to the use of force in these conflicts my perspective is, of course, legal. But whether the legal issues raised were of a broad constitutional nature or of a very specific operational nature, they cannot be disassociated from the overall political framework and context in which they arose. I have attempted to present the issues as they arose and without the benefit of hindsight and I make no particular claim as to the wisdom of the Secretariat’s views. History will be the ultimate judge of that.

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The Security Council's actions in response to Iraq's invasion of Kuwait in 1990 were in many respects the model of what collective security under the Charter could be in a kind of post-modern interpretation of Chapter VII enforcement. After decades of Cold War paralysis the Security Council appeared to have been revitalized. Charter provisions which had previously been held in abeyance or only sparingly utilized were being implemented. The Security Council took centre stage and the establishment of a new world order, however improbable, appeared possible. No one serving in the Secretariat at that time had ever seen anything like it.

The euphoria did not last long. Within a short time, serious differences began to emerge between the Secretariat and the main coalition partners concerning both the process and the content of the Security Council's actions. By the end of the 100 hours ground phase of the combat in February 1991 the Secretary-General had begun to raise questions about the compatibility of certain tactics with the laws of war and humanitarian law. What had started out as an enforcement action under Chapter VII with the imprimatur of the United Nations had evolved into a military engagement by third parties over which the Security Council exercised little or no control. Within days of the end of combat operations the Secretary-General publicly distanced the United Nations from Desert Storm. How had the public perception of a successful United Nations intervention come to be seen by the Secretariat as potentially undermining the values and principles contained in the Charter?

Between peace and war

Following the occupation of Kuwait by Iraq on 2 August 1990 the Security Council had moved with unaccustomed efficiency to adopt a series of

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decisions which drew sequentially on the measures available to it under Chapter VII, specifically Articles 39, 40 and 41. It made a determination of the existence of a threat to international peace and security, decided on provisional measures and imposed sanctions.¹ Within days it had declared Iraq's annexation of Kuwait null and void² and had authorized forcible measures to enforce compliance with sanctions.³ That particular resolution (665) had also requested Member States to use the Security Council's Military Staff Committee to coordinate these activities.⁴

Very few people outside of the United Nations knew or remembered that such a Committee existed, let alone functioned. The Committee was never convoked for that purpose, however, and it was the last time that an attempt was made to bring the forcible measures regime under the formal control of an inter-governmental United Nations organ.

All five Foreign Ministers of the P5 were present at a meeting of the Security Council on 25 September 1990.⁵ That was an extremely rare event in those days and was taken as a sign of the new-found cohesion of the P5 and of the importance they attached to the role of the Security Council in the post-Cold War world. At that meeting the Council further tightened the sanctions on Iraq (by explicitly confirming that they applied to all means of transportation, including aircraft), but that meeting was notable for one other reason.

Secretary-General Perez de Cuellar interjected a cautionary note into the proceedings by drawing attention to the manner and the scale in which the Council was employing Chapter VII enforcement provisions. He was concerned that the United Nations needed to demonstrate that 'the way of enforcement is qualitatively different from the way of war... that it strives to minimize undeserved suffering... and that it does not foreclose diplomatic efforts to arrive at a peaceful solution'.⁶

¹ Security Council resolutions 660 and 661 (1990).

² Security Council resolution 662 (1990).

³ Security Council resolution 665 (1990).

⁴ *Ibid.* Operative paragraph 4 requested the States concerned, that is the Member States cooperating with the Government of Iraq, a group that came to be known as the coalition of the willing, to coordinate their forcible actions in implementing the economic sanctions imposed by resolution 661 using 'as appropriate' the mechanism of the Military Staff Committee.

⁵ The P5 refers to the five permanent members of the Security Council (China, France, Russian Federation, United Kingdom and the United States).

⁶ Statement of Secretary-General Perez de Cuellar to the Security Council on 25 September 1990, Document SG/SM/4495-SC/5215.

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While to some extent this statement must be viewed in the context of the Secretary-General's then on-going exercise of his good offices functions in the conflict, it was nevertheless noteworthy for its use of the phrase the 'way of war' which contrasted sharply with the collective enforcement provisions and seemed to summon up a pre-Charter view of international relations, and his emphasis on the necessity to protect the civilian population caught up in the armed conflict or as victims of a draconian sanctions regime, and the absolute priority of reaching a settlement through diplomatic means rather than use of force.

All necessary means

In a final attempt to secure full compliance with its decisions the Security Council met again at the Ministerial level on 29 November 1990. The Council offered Iraq a clear choice between peace and war. Resolution 678 decided to allow Iraq 'one final opportunity, as a pause of goodwill' to fully implement on or before 15 January 1991 resolution 660 and all subsequent resolutions. In the event of its failure to do so the Council authorized Member States cooperating with the Government of Kuwait 'to use all necessary means', which was understood to mean military force, to uphold and implement the resolutions and to 'restore international peace and security in the area'.⁷

This decision was achieved by a vote of twelve in favour, two against and one abstention. It represented only the fourth time in the history of the United Nations that it had decided to authorize the use of military force by Member States.⁸ Although one permanent member had abstained (China), United Nations practice had long since treated an abstention or non-participation by a permanent member as a non-veto.⁹ Hardly anyone paid much attention to the two negative votes by Cuba and Yemen, countries that were considered to be of little significance in the great scheme of things. In fact, their opposition, which was on the grounds that the Council's authorization of military action would not be subject to the command and

⁷ Security Council resolution 678 (1990).

⁸ The Security Council had authorized the use of force in Korea in 1950 and forcible measures to implement economic sanctions against Rhodesia in 1966. Prior to resolution 678 the Security Council had authorized forcible measures to implement economic sanctions against Iraq in resolution 661.

⁹ R. Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies*, Sijthoff: Leyden (1968), 182–6.

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control of the United Nations, could be seen as an important position of principle.

The formulation of 678 presented the Secretary-General with something of a dilemma. How should the measures authorized by that resolution be characterized from the Charter point of view? They obviously went beyond Article 41 but did they constitute an action under Article 42 absent United Nations command and control? Unlike the measures decided in 665 which had been placed under the authority of the Security Council, no such reference was to be found in 678. Apart from a request to the states concerned to keep the Security Council regularly informed on the progress of action taken it appeared that the Council had effectively surrendered or contracted out its authority to the coalition.

The immediate consequences of this situation in terms of the responsibility of the Security Council and the United Nations soon became apparent when the air-phase of the war began on 17 January 1991. The Secretary-General publicly aired his concerns on the issue of proportionality in regard to the means used to bomb civilian areas. He also expressed concern over the inability of the Council to exercise any influence or control over the continued bombardment of the Iraqi army after it had crossed back into Iraq from Kuwait.¹⁰

A failure of collective diplomacy

For the Secretary-General the failure to avert war had been a failure of collective diplomacy. While at first sight the actions taken through the Security Council appeared to validate the relevance of the collective security system, on closer analysis the actions taken seemed to contain the seeds of future difficulties and far from reflecting the inherent strengths of the Charter system revealed a number of weaknesses. These included the severity of the effects of sanctions on third states and the inadequacy of Article 50 to deal with this problem, the increased vulnerability of civilian populations in a time of increased technological power, and the need for the Security Council to preserve for itself what the Secretary-General described as ‘the authority to exercise guidance, supervision or control with respect to

¹⁰ These concerns were reflected in a series of press statements issued by the Secretary-General. He returned to these issues in two major addresses given at the European Parliament in Strasbourg on 17 April 1991 and at the University of Bordeaux on 22 April 1991. See Document SG/SM/4577 of 18 April 1991 and Document SG/SM/4560 of 24 April 1991.